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No. 85-2033

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE, *et al.*,
Appellants,

vs.

THE CITY OF IRONTON, OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION TO DISMISS

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QUESTIONS PRESENTED FOR REVIEW

Should the appeal by the Ninth Street Paving Project Committee be denied because (1) no substantial Federal question is raised by this appeal from the ruling of the Ohio Supreme Court that Appellants received adequate notice of the Ninth Street improvement projects; (2) the judgment of the Ohio Supreme Court is correct under applicable principles of equity; and (3) the appeal is merely an attempt to relitigate questions of fact already determined by the trial court.

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STATEMENT OF THE CASE

As early as 1962 Appellees, the City of Ironton (a municipality of approximately 14,000 population located in southeastern Ohio) and its officials, first considered the improvement of certain streets in the Ninth Street and Twelfth Street areas of the City. For a number of years, however, the City was not able to proceed with these improvements because the residents of the area were predominantly of low and moderate income levels and would have been hard pressed to pay the full amount of special assessments required to finance the projects *in toto*.

With the genesis of the United States Department of Housing and Urban Development Community Development Block Grant program, the City recognized a potential source of funds to offset the costs of the projects to the residents. The City diligently and expeditiously applied for such a Block Grant.

In connection with the Block Grant application, the Ironton Community Development Committee (the "Committee") was formed by the City to ensure that there was public participation in the preparation of the Block Grant applications and in the expenditure of any moneys received pursuant thereto. Many of the Appellants were members of the Committee and/or attended its meetings, which were held as often as once a week during the relevant period. The Committee's meetings were given extensive coverage by local media.

As required by Section 727.12 of the Ohio Revised Code, the City adopted a resolution of necessity with respect to the Ninth Street improvement projects on March 25, 1976. On April 1, 1976, notice of the resolution was sent via certified mail to those residents whose property was affected by the first construction contract. On September 9, 1976, the City gave notice to the remaining residents of the Ninth Street project area, again via certified mail. Brent McGinnis, Director of Community Services and supervisor of the Block Grant application process, oversaw the mailing of notices for the City. At trial, Mr. McGinnis testified that all of the residents of the affected area were sent notice via certified mail. The City also caused notice of the resolution to be published in the local newspaper on April 30, 1976 and May 7, 1976.

On September 9, 1976, the City enacted an ordinance to proceed. The City then realized that the statutory re-

quirement (embodied in Section 727.18 of the Ohio Revised Code) that residents of the affected areas have fourteen (14) days after service of notice within which to file objections to the proposed assessments was not satisfied as to the residents notified on September 9, 1976. The City therefore took no action pursuant to the September 9, 1976 ordinance to proceed and reenacted the ordinance in October, 1976. At no point was a single comment or objection heard.

The notices stated that plans, specifications, profiles of the proposed improvements, and cost estimates were on file. While the City did have plans, specifications and cost estimates on file, there were no profiles, nor were the aforementioned items on file in the office of the Clerk of Council, as required by statute, since, at the time no such office existed. Rather, the plans, specifications and estimates were on file at the office of the City Engineer and all notices, mailed and published, so stated. No one sought to examine any of the aforementioned items.

Work was completed on the Ninth Street project in September, 1979 and on the Twelfth Street project in 1980. In March, 1981, the City approved and levied the special assessments. After a brief attempt by Appellants to prosecute an action in Federal Court, this litigation ensued.

The Common Pleas Court of Lawrence County, Ohio found that the City of Ironton, and its duly elected, appointed, and acting officials and agents substantially complied with the requirements of the Ohio Revised Code, and that the special assessments were valid. The Court of Appeals of Lawrence County, Ohio held that sufficient evidence existed to support the trial court's finding regarding Appellee's substantial compliance

with the notice requirements, reversing only as to certain state law questions. The Supreme Court of the State of Ohio found that the Appellees made a bona fide effort to attempt to notify property owners in the affected areas of Ironton by certified mail and by publication, and that the improvements made were within the common knowledge of the persons residing within the areas of the street projects.

ARGUMENT

A. THE APPEAL BY THE NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THIS APPEAL FROM THE RULING OF THE OHIO SUPREME COURT THAT APPELLANTS RECEIVED ADEQUATE NOTICE OF THE NINTH STREET IMPROVEMENT PROJECTS.

The question raised in this appeal is not so substantial as to require appellate review by the United States Supreme Court. The decisions of this Court have clearly and consistently provided the test for the level of notice necessary to meet the requirements of the Due Process clause of the Fourteenth Amendment.

The Court has repeatedly stated that proper notice is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of an action and afford them an opportunity to present their objec-

tions. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Greene v. Lindsey*, 456 U.S. 444 (1982); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). The Court has also noted that no rigid formula exists for judging the adequacy of any attempts at providing notice to a party; the notice required will vary with the circumstances and conditions surrounding a given dispute. *Mullane, supra; Walker, supra.*

In the instant case, each Appellant had at least five, and some Appellants had six, ways to receive notice of the Ninth and Twelfth Street improvement projects. A number of the Appellants attended the Ironton Community Development Committee meetings during preparation of the Block Grant application. Those not present at the Committee meetings were apprised of the proceedings through extensive coverage provided by the local media. The City sent notice of the project to those residents whose property was affected by the construction project. Additional notice was provided by two separate publications in the local newspaper. Residents could have learned of the project through conversations with their neighbors. Finally, the residents' opportunity to witness the construction of the improvements provided them with undeniable actual notice of the project.

The seminal decision in this area, *Mullane*, also considered notice directed toward a class of people. The Court stated that in such a situation,

> The individual interest does not stand alone but is identical with that of a class. . . [N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. 339 U.S. at 319.

The situation contemplated by this passage is at hand in the instant case. If any of the residents of the Ninth and Twelfth Street neighborhoods had raised an objection, the interests of all residents would have been protected. No objections were timely raised.

The Supreme Court recently noted in *Greene* that "sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests." 456 U.S. at 451. The five or six separate forms of notice available in the instant case informed the residents of the project. Testimony and evidence presented in the trial court supports the factual conclusion that the Appellants had sufficient notice of the improvements to meet Due Process clause requirements. This appeal is merely part of a continuing effort by a group of people, each of whom had notice of the street improvement program, to avoid paying their fair share of the completed street improvements. The question presented by the appellants is clearly not so substantial as to merit review in the United States Supreme Court.

B. THE APPEAL BY THE NINTH STREET COMMUNITY PAVING PROJECT SHOULD BE DENIED BECAUSE THE DECISION OF THE OHIO SUPREME COURT IS CORRECT UNDER APPLICABLE PRINCIPLES OF EQUITY.

An examination of the opinion of the Supreme Court of the State of Ohio (Jurisdictional Statement, Appendix p. 1a) clearly indicates that the court ruled on a question of equity. The question presented to the court required an analysis of the Appellants' compliance with the strictures of Ohio Revised Code § 727.12. The court reviewed three Ohio decisions and determined that equitable principles should be applied to such controversies.

The court considered and approved of the actions of the Appellees in light of Ohio Revised Code § 727.40. That section provides, *inter alia*,

> Proceedings with respect to public improvements to be paid for . . . by special assessments shall be liberally construed . . . by the courts in order to secure a speedy completion of the work at a reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment.

The Ohio Supreme Court decision is properly based upon this Ohio statutory provision and upon principles of equity. The three Ohio courts which have considered this dispute have liberally construed the Appellees' actions under Ohio Revised Code § 727.12 and found substantial compliance sufficient to satisfy the requirements of the statute. The same courts applied principles of equity to this dispute and determined that by

allowing the improvements to be completed without objection, then objecting when assessments were levied, the Appellants had waited too long. The Appellants, after three failed attempts in Ohio courts, would ask the United States Supreme Court to place its imprimatur on their attempts to avoid paying their fair share of the costs of the improvements. Principles of equity dictate that the Appellants should not be rewarded for such conduct.

C. THE APPEAL BY THE NINTH STREET PAVING COMMITTEE SHOULD BE DENIED BECAUSE THE APPEAL IS MERELY AN ATTEMPT TO RELITIGATE QUESTIONS OF FACT ALREADY DETERMINED BY THE TRIAL COURT.

Appellants essentially ask the Court to determine whether or not the residents of the Ninth and Twelfth Street neighborhoods received notice of the street improvement program. They rely heavily on testimony and exhibits which, they claim, establishes the failure of Appellees to give notice. They fail to point out, howEver, that the record also contains evidence which, if believed, establishes that the Appellees gave notice reasonably calculated under all the circumstances to apprise Appellants of the pendency of the assessment proceedings and to afford them ample opportunity to present their objections. This question of fact has previously been answered by Common Pleas Court of Lawrence County, Ohio (Jurisdictional Statement, Appendix p. 30a). No reviewing court is in a position to resolve factual questions such as those presented here. The Supreme Court of the United States is not an appropriate forum for the relitigation of stale factual questions.

CONCLUSION

Appellees respectfully request this court to dismiss the Appellants' appeal from the Supreme Court of the State of Ohio. The appeal fails to present a substantial federal question, the decision appealed from is properly based on principles of equity, and the appeal presents factual questions previously answered at the trial court level.

Respectfully submitted,

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